Supreme Court U.S.
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NO.

IN THE
**SUPREME COURT OF THE UNITED STATES**

**DONALD A. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE,** AND **NICOLE M. PETRONE,** A MINOR, BY AND THROUGH HER FATHER, RICHARD P. PETRONE,
*Petitioners,*

V.

**JEFFERSON COUNTY SCHOOL DISTRICT R-1,**
*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In the wake of the tragic shooting at Columbine High School in April 1999, school officials invited students and hundreds of community members to participate in an art project designed to foster community healing. Students, friends and family members, alumni, police, firemen, ambulance attendants and hospital workers were all invited to paint four-inch by four-inch tiles, to be affixed to the school's hallways. Tiles were painted at locations both on and off school property while classes were not in session. School officials strictly enforced only one rule relating to the viewpoint of the expression on the tiles – a prohibition on religious symbols of any kind. School officials eventually ordered custodians to chisel all "religious" tiles from the walls. The Tenth Circuit Court of Appeals held that the tiles constituted "school-sponsored speech" and that *Hazelwood School District v. Kuhlmeier* permitted school officials to censor tiles because of their religious viewpoint. Petitioners present the following questions:

I. Whether *Hazelwood School District v. Kuhlmeier* permits viewpoint-based discrimination against religious speech where the speech, consisting solely of private expression, is deemed by school officials to be "school-sponsored."

II. Whether the tile-painting project constituted "school-sponsored" speech within the meaning of *Hazelwood School District v. Kuhlmeier*, or remained instead a limited public forum.

## PARTIES TO THE PROCEEDING

All parties to the proceedings in the Tenth Circuit are listed in the caption of the Petition. Jefferson County School District R-1 board members Jon DeStefano, Tori Merritts, David R. DiGiacomo, Debby Oberbeck and Vince Chowdhury were Defendants in the District Court, but did not participate in the appeal.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the decision and judgment of the Tenth Circuit Court of Appeals, which held that the Supreme Court's decision in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), sanctioned Respondent's policy of censoring religious symbols from artwork generated by community members in a forum for expression created by school officials.

## OPINIONS BELOW

The Opinion of the Tenth Circuit Court of Appeals, dated June 27, 2002, appears as Appendix A hereto, and is reported at 298 F.3d 918 (10th Cir. 2002). The unpublished Order denying the petition for rehearing and amending the Opinion, dated August 16, 2002, appears as Appendix B. The unpublished Judgment of the United States District Court for the District of Colorado, filed November 7, 2001, appears as Appendix C. The Findings of Fact, Conclusions of Law and Order entered by the United States District Court for the District of Colorado on November 1, 2001, appear as Appendix D, and are reported at 170 F.Supp.2d 1094 (Dist. CO 2001). The unpublished Order Amending Findings of Fact, Conclusions of Law and Order, filed November 6, 2001, appears as Appendix E.

## STATEMENT OF JURISDICTION

The District Court exercised jurisdiction over Petitioners' federal claims pursuant to 28 U.S.C. § 1331. The court entered Findings of Fact, Conclusions of Law and an Order disposing of all claims and all parties on November 1, 2001. App. D; Court of Appeals Appendix ("C.A. App.") at 101-53. The court entered an Order Amending Findings of Fact, Conclusions of Law and Order on November 6, 2001. App. E; C.A. App. at 158. The court's Judgment was entered on November 7, 2001. App. C; C.A. App. at 161; 13 (docket entry). Respondents filed timely Notice of

Appeal on November 5, 2001. C.A. App. at 12 (docket entry). *See* FED. R. APP. PROC. 4(a)(2).

The Tenth Circuit Court of Appeals entered its Decision on June 27, 2002. App. A. Petitioners filed a timely Petition for Reconsideration or in the Alternative, for Rehearing *En Banc* on July 11, 2002. The Court of Appeals entered an order denying the petition on August 16, 2002. App. B. The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONST., AMEND. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

## STATEMENT OF THE CASE

### A. Factual History.

In July and August of 1999, Columbine High School

officials invited students and members of the general public to participate in an art project. Columbine officials planned for the project to be an opportunity for students and community members to "reclaim" their school from the acts of violence that had occurred there some three months earlier when two former students gunned down twelve students and one teacher. The purpose of the project, as Respondent stated in its press releases (App. D28, ¶ 21; C.A. App. at 291), was twofold. First, school officials believed that students would become more comfortable with the surroundings of the school by coming into the school building to participate in the project. Second, school officials wanted to give students an opportunity to be involved in the reconstruction of the school by allowing them to paint tiles. Respondent's employees testified that the project was designed to give members of the public a chance to express themselves regarding the process of healing from the trauma caused by the shooting.[1]

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1

> A. .... The original tile project was to decorate the school. After April 20, it did become a way of healing, a way of getting in touch with each other and with yourself.

App. I3 (Testimony of Puanani Warnke).

> Q. .... After the shooting, the tile project that the community participated in was to help with the healing process, correct?
> A. Correct.
> Q. The purpose was to allow students, community members, whoever painted tiles, to express themselves as part of the healing process, correct? * * * *
> THE WITNESS: It would be a – anytime you put something down on tile or paper would be an opportunity for people to express themselves, correct.
> Q. And it was expression in connection with the healing process, was it not?
> A. Correct.

Students, families and friends of students, families and friends of former students who were murdered or injured in the shooting or others associated with the school, alumni, police, firemen, ambulance attendants and hospital workers were invited by school officials to paint four-inch by four-inch tiles, which were to be affixed to the walls of the school's hallways.[2] Anyone who appeared at a tile painting session was allowed to participate, and teachers and volunteers monitoring the tile painting sessions did not check the identities of participants.[3] The media was invited to one of the sessions. C.A. App. at 292.

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App. K1-K2 (Testimony of Frank DeAngelis).

[2] Respondent's employee, area administrator Barbara Monseu, described the project as consisting of designing tiles "that would be affixed to the interior of the building, in the hallways." C.A. App. 554.

[3]

> Q. So the tile painting that morning [of July 19, 1999] was not limited strictly to Columbine High School. No?
> A. We didn't even ask for Ids when people came in.* * * *
> Q. All right. What do the photos on page 4 of Plaintiff's Exhibit 10 show?
> A. These are from the alumni picnic that we had on July 25. I'm sorry, I don't know if it's the 24th or 25th now. It was a Sunday.
> Q. And was that picnic at Columbine High School?
> A. No. It was at Columbine Knolls Park.
> Q. Now, was that restricted to alumni painting, or could somebody else paint tiles?
> A. Anybody who showed up painted a tile. Again, we didn't ask for IDs. It was parents, alumni, their kids, grandkids. Neighbors.

App. H5, H6 (Testimony of Barbara Hirokawa).

Respondent's area administrator, Ms. Monseu, approved the tile project and quickly crafted restrictions on viewpoint. *See* Lodging at L38, handwritten memorandum regarding guidelines. When explaining the project to the school board and other administrators, she said, "This is a project outside of the school, this is a separate project, but we're trying to keep track of what's going on, not necessarily control everything, but keep track of what's going on." C.A. App. at 562-63. Tiles and supplies for the project came from private donations. C.A. App. 112-13, 354-56.

When the participants, including Petitioners, arrived at the tile-painting sessions, they were provided with no written guidelines or instructions, and were not told what to paint on the tiles. App. H1 (Diedra Fleming); J1 (Don Fleming). However, school officials informed participants that they must not include any type of religious symbol in their artwork. *Id.* Further, the tiles were not to include anything obscene or any reference to the shooting, the date of the shooting, or the names of the victims.[4] *Id.* Respondent's

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[4] Respondent's employees testified that the restrictions on religious symbols, names, and the date of the shooting were necessary to remove all reminders of the shooting from the hallways of the school to prevent students from being traumatized, and to prevent the tile project from becoming a memorial to the victims. C.A. at 116. However, Respondent's officials placed numerous reminders of the shooting and memorials to the victims in and around the school, including a framed poster that read, "God wept over Columbine this day, April 20, 1999," Lodging L11; a plaque that said, "In honor of those who lost their lives or those who had their lives changed forever on April 20, 1999;" a frame containing a victim's jersey and other memorabilia; and a sandstone memorial to slain teacher Dave Sanders installed at the entrance to the school's softball field, renamed "Sanders Memorial Field." C.A. App. 116-17, 219, 289-90. Moreover, the halls of Columbine High School contained mobiles with religious symbols and references, Lodging at L10, and a time line of the history of art including copies of many religious works. C.A. App. 118, 270-77.



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employees were not instructed on which religious symbols and expression would not be permitted.[5] One teacher, Barbara Hirokawa, testified:

> Q. Now, how did you determine if something was a religious symbol and shouldn't be painted?
> A. Anything that was an obvious religious symbol. Angels, kids were trying to do angels in the morning, crosses. If we had had any stars of David or anything like that, we would [125] eliminated those, too.
> Q. What sort of thing did you consider an obvious Christian symbol, for example?
> A. Cross.
> Q. Anything else?

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[5] The teachers who monitored the tile painting sessions testified:

> Question: Do you know what was considered to be a religious symbol that was inappropriate to put on a tile.
> Answer: No, I don't.

App. at I7 (Testimony of Elizabeth Keating – By Deposition).

> Q. How did you decide which symbols were religious symbols, which symbols weren't religious symbols if you didn't have a list.
> A. Basic knowledge.
> Q. What do you mean basic knowledge?
> A. Most people in the United States know that the cross stands for Christianity, that the star of David stands for Judaism. Islam has the crescent moon and star.

App. I2-I3 (Testimony of Puanani Warnke). Nonetheless, "basic knowledge" apparently did not extend to Eastern religions, since the *yin-yang* symbol of Taoism was placed on the wall. *See* Lodging L17, top right photograph.

A. Angels.
Q. What about the Christian fiche [*sic*] symbol, or do you know what I mean by the Christian fish symbol?
A. We didn't think of that at first, but it was – it was not – you know, it was something that was recognizable, so we were saying, you know, do designs. I don't remember running across that at that particular day or at least in the morning when I was helping the kids.
Q. All right. So you could not paint, for example, a star of David?
A. Right.
Q. And what is a star of David? Can you describe it?
A. It's a six-pointed star.
Q. Okay, so a five-pointed star was okay, was it not?
A. Probably.

App. H7-H9 (Testimony of Barbara Hirokawa).

Many participants, including Petitioners, were offended by the restrictions. Petitioner Susan Petrone had planned to paint a tile with a heart, a small cross, and her murdered son's name. She painted the tile anyway. *See* Lodging L3. Petitioner Richard Petrone painted one tile with a "stick man" and the name of the murdered student who would have been his stepson, Daniel Rohrbough. L4. Mr. Petrone also painted a tile containing a cross, the letters L-O-V-E, and a peace sign. *Id.* Petitioner Nicole Petrone, Daniel Rohrbough's sister, painted a tile with a rose, a heart, a small yellow cross, and her brother's name. L3. Daniel's father, Petitioner Brian Rohrbough, painted one tile with 13 red crosses and another tile with a Bible verse that stated, "There is no peace says the Lord for the wicked" and containing Daniel's name. L1.

Petitioner Lisa Rohrbough's experience was typical of Petitioners'. Ms. Rohrbough (then Lisa Maurer) painted a tile with the words "Jesus Christ is Lord," and the initials "D.R." L2. She also painted a tile containing a heart, a fish symbol, a small hill with three crosses, and the initials "D.R." *Id.* She testified:

Q. And what does the tile at the top show us?
A. The top tile is a tile that were symbols that gave me comfort and peace. The fish symbol, which to me means peace. And beside that are the three crosses representing Christ and the two thieves that day at Calvary, and I've always drew that as a child, so it brings me comfort. In the other corner is Dan's initials. And in the bottom corner is a heart which to me symbolizes love. * * * *
Q. And what is shown on the second tile you painted there at the bottom of page 2 of Plaintiffs' Exhibit 1?
A. On the bottom tile are Dan's initials, a cross, and Jesus Christ is lord.
Q. Why did you paint that tile?
A. I painted that tile because after Columbine, after April 20, 1999, the one thing that has and continues to keep me functioning and going is my knowledge that Dan is with Jesus and that I'm going to see him again; and even on the worst of days, that's what sustains me and the only memory that – I have good memories of Dan from when he was here and [290] alive, but the memory I have now that always stays with me is that I'll see him again, and that's only possible because Jesus Christ is the lord.

App. I4-I5 (Lisa Rohrbough). Ms. Rohrbough explained, "I can't paint tiles without religious symbols because it wouldn't be being true to myself or my memory of Dan." App. I5.

Respondent's employee Barbara Hirokawa testified about Ms. Rohrbough's tile:

Q. [128] Let's look at page 2 of Exhibit 1, the tile, the upper portion of that page. Is that a tile that was not allowed to be put up on the wall? * * * *
A. Yes.
Q. And why not?
A. Because there's crosses on a hill.

Q. If there had been trees on a hill, you wouldn't have had problems with it?
A. Yes. Because the crosses came to stand for not just the – this happens to be three which is a representation of the crucifixion, but also with the crosses on Rebel Hill.
Q. So if there had been three trees on the hill, you wouldn't have had a problem with that?
A. Probably not.

App. H8-H9 (Hirokawa).

Petitioner Deidra Fleming was the mother of Kelly Fleming, who was murdered at Columbine. Ms. Fleming had planned to paint a tile with the date of the shooting, "4/20/99," and the words "Jesus Wept." However, those seated around her told her that this was not allowed. Mrs. Fleming testified:

Q. How did you feel when you found out about the restrictions?
A. I just felt deflated. I was crushed that I couldn't paint what I had come there to paint.
Q. Why did you want to paint that particular tile?
A. For me, God was a very important part of that date. And Jesus wept, for me, stated that he, along with the rest of the world, stood there at the horror that happened that day and he wept.

App. H3 (Diedre Fleming).

Kelly Fleming's father, Petitioner Donald Fleming, also wanted to paint a tile with the date "4/20/99" and the words "Jesus Wept," but was prevented from doing so by the school's restrictions.

Q. Why did you want to paint that particular tile?
A. That is – that's the tile, when we were originally asked back in June or July to paint the tiles, that's the tile that we discussed that would be most appropriate from both of our points of view.

Q. How did you feel when you found out that you couldn't paint the tile that you wanted to paint? * * * *
A. I felt like – personally, I felt like I was stabbed in the heart, and I was very offended.

App. J1-J2 (Donald Fleming).

Many painted tiles were never affixed to the walls by Columbine officials because they contained religious connotations or other prohibited expression. However, area administrator Monseu subsequently discovered that some tiles containing prohibited expression had been affixed to the walls. Acting on instructions from Ms. Monseu, Assistant Principal Patricia Patrick then conducted an evaluation of each and every painted tile, marked those she deemed "inappropriate," and instructed the custodian to chisel every marked tile from the wall. App. J6 - J8. However, again, Ms. Monseu did not explain what religious expression was prohibited.[6]

Ms. Patrick admitted that numerous tiles were removed because they appeared to contain crosses.[7] *E.g.*, L19 - L31.

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Q. [386] Did she tell you what type of tiles would have religious symbols or religious connotations so that you should remove them?
A. No.
Q. She just left that to your discretion?
A. Yes.

App. J7 - J8 (Patricia Patrick).

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Q. [399] Okay. Would you please look at page 5 of Exhibit 11, the top photograph? * * * Can you tell me why that tile was removed?
A. Because it appears like there's a cross on that tile.* * *
Q. [403] Well, let's look at the tile in photo 77. On page 18. Do you see that?

Others were removed because they appeared to depict angels. *E.g.*, L26, L32 - L34. However, tiles that appeared to depict similar non-religious figures such as fairies were left on the walls. *E.g.*, L17. One tile, depicting a large angelic wing in the clouds surrounded by small crosses (L26), may have been removed for either reason, Ms. Patrick testified, though she admitted it was a close call.[8] Ms. Patrick further testified that tiles that depicted fish were acceptable, but those that depicted the Christian fish symbol (*see* Photo, L35) were not.[9]

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A. Yes.
Q. Why was that tile removed?
A. Because of the crosses.

App. J8 - J9.

8

Q. Now, would you agree that that shows some type of wings up in the sky with clouds?
A. Yes.
Q. If those crosses had been stars, would you have removed it?
A. I probably would have because of the wings on this, probably.
Q. Wings were on the list of things to be removed?
A. Well, it's a judgment call. That's a judgment call.
Q. Are the wings some kind of religious symbol?
A. I may have left it up. It would be hard. I may have left it up or I may have taken it down.

App. J9 - J10 (Patrick).

9

Q. What about photograph 0114 on the same page. Why was that taken down?
A. Because it appeared to be a fish.
Q. There is something wrong with fish on the walls?
A. Other than it is a religious connotation.

Of the approximately 2,100 tiles that had been affixed to the walls, eighty to ninety tiles were removed. *See* Lodging at L19 - L35. These included Petitioner Nicole Petrone's tile. Lodging at L3. The actions of Ms. Monseu, Ms. Patrick and the other employees of Respondent in censoring tiles containing religious symbols were expressly in furtherance of Respondent's policy. Board member Jon DeStefano acknowledged that the removal of the tiles "was in adherence to our policy." App. at J4 (Jon DeStefano). He testified:

> Q. Did you approve of taking down the religious symbols that had been put up?
> A. We approved of our policy being upheld, absolutely.
> Q. So that's a yes, that you and the board –
> A. Absolutely.

App. at J4 (DeStefano).

As a result of the strong objections of participants in the tile-painting project to the restrictions on their expressions, Ms. Monseu held two separate meetings with Petitioners and other participants. At the first meeting, Ms. Monseu reiterated that tiles containing religious symbols would not be affixed to the school's walls. C.A. App. 115. At the second meeting, however, Ms. Monseu relaxed other restrictions by allowing families of the victims to paint tiles with their children's names, initials, dates other than April 20th, and the Columbine ribbons, and said these tiles would be put up in the school. C.A. App. 116. In other words, the only restrictions that were left in place were those prohibiting religious symbols, the date

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> Q. Is this an example of the Christian fish, then?
> A. That's how I interpreted it.
> Q. It didn't have the Christian fish, but it just had the word "truth," would it have been left on the walls? * * * *
> A. Probably would have been left.

App. J6 - J11 (Patrick).

of the shooting, or anything obscene or offensive.[10] For example, Ms. Monseu testified that under the amended policy, tiles that included a child's name, such as Petitioner Susan Petrone's tile, Lodging L3, would have been acceptable but for their religious content.[11]

B. Proceedings in The District Court.

Believing that the school's discrimination against their religious expression was unconstitutional, Petitioners filed suit against school

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Q. .... After September 9, 1999, the families were free to put their child's name on a tile?
A. That is correct.
Q. They were free to put the child's initials on a tile?
A. That is correct.
Q. They were free to use a Columbine ribbon?
A. That is correct.
Q. [184] But it's your recollection that they were not free to use the date 4-20-99.
A. Correct.

App. H16 (Monseu)

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Q. [188] And the bottom photograph, it's a yellow cross superimposed on a heart?
A. Yes, I do [see it].
Q. And under your new criteria, would not have been put up either?
A. Correct.
Q. And if the cross is removed, then the heart and the name Dan Rohrbough could be put up?
A. Correct.

App. at H17 (Monseu).

officials, alleging violations of the Free Speech Clause and Establishment Clause of the First Amendment as well as violations of their free speech rights under the Colorado Constitution. *See* Appendix F, Complaint. In attempting to justify its censorship of religious expression, Respondent argued that the tiles painted by Petitioners constituted government speech, or, alternatively, school-sponsored speech to which the relaxed *Hazelwood* standard of review applied. *See* Appendix G, Answer to Complaint, paras. 13 - 17 at G3 - G5. The District Court rejected both of these arguments and moved on to determine whether the tile-painting project constituted a forum. 170 F.Supp.2d at 1107-08. The court agreed with Petitioners that the school had created a limited public forum by opening access to the expressive project to a broad segment of the community. *Id.* at 1111.

Finally, the District Court considered whether the restrictions imposed on participants in the tile project were viewpoint-neutral and reasonable in light of the forum's purpose. The court held that the restriction on religious symbols constituted prohibited viewpoint-based discrimination and applied strict scrutiny to said restriction. *Id.* at 1113-15. The restriction did not survive strict scrutiny because the District Court found that the school's asserted interest in avoiding an Establishment Clause violation was not compelling. *Id.* at 1115. The court reasoned that the school would not have violated the Establishment Clause if it had merely allowed equal access to the forum for religious and secular views. *Id.*

C. The Court of Appeals.

A three-judge panel of the Tenth Circuit Court of Appeals granted an emergency appeal and reversed the District Court's decision based upon an analysis that was markedly different from that conducted by the District Court. The Tenth Circuit first concluded that the tile project constituted school-sponsored speech, and thus was governed by the *Hazelwood* standard. 298 F.3d at 924. According to the Tenth Circuit's broad interpretation, the restrictive *Hazelwood* standard governs expression in any

school activity that can be said to "affect learning" if the speech might reasonably be perceived to bear the imprimatur of the school. *Id.* at 925.

The Tenth Circuit next held that the *Hazelwood* standard permits public high school officials to discriminate against expression on the basis of the viewpoint expressed, including the religious viewpoints of Petitioners. *Id.* at 926. The court noted that a split exists among the Circuits on this issue:

> Our sister circuits have split over whether *Hazelwood* requires that schools' restrictions on school-sponsored speech be viewpoint neutral. Most recently, a panel of the Third Circuit expressed its view that *Hazelwood* does not require viewpoint neutrality of school districts [citing *C. H. ex rel Z. H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir. 1999), ~~*aff'd on other grounds*~~, *vacated for en banc review*, *C. H. ex rel Z. H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000)(*en banc*), *cert. denied*, *Hood v. Milford Township Bd. of Educ.*, 533 U.S. 915 (2001)].... The First Circuit reached a similar conclusion in *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993).... On the other side of the debate, the Ninth Circuit in *Planned Parenthood* held that *Hazelwood* required viewpoint neutrality [citing *Planned Parenthood of S. Nev., Inc. v. Clark Cty Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991)].... A subsequent panel of that Circuit, however, recently has criticized that holding. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, *Downs v. Los Angeles Unified Sch. Dist.*, 532 U.S. 994 (2001).... A divided panel of the Sixth Circuit in *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), stated, without discussion, that the *Hazelwood* Court 'noted' that non-viewpoint-based restrictions were part of its analysis.... Finally, the Eleventh Circuit has expressed doubts that the *Hazelwood* Court intended to "drastically rewrite First Amendment law to allow a school official to

> discriminate based on a speaker's views," *Searcey v. Harris*, 888 F.2d 1314, 1319 *n.*7 (11th Cir. 1989), and stated it would "continue to require school officials to make decisions relating to speech which are viewpoint neutral."

*Id.* at 926-28 (text superseded by Order of June 27, 2002 overstruck; text added by Order underlined).

Despite acknowledging the Eleventh Circuit's cautionary note, and in the face of more than a decade of Supreme Court precedent consistently reiterating that viewpoint discrimination is the most egregious type of content discrimination, the Tenth Circuit held that the Court's decision in *Hazelwood* permits school officials to engage in viewpoint discrimination. *Id.* at 928. The court reasoned that this conclusion followed logically from this Court's emphasis upon the "uniqueness of the public school setting and the deference with which it viewed decisions made by educators." *Id.*

Turning to the application of *Hazelwood* according to that interpretation, the Tenth Circuit held that the tile project did not constitute a traditional or designated public forum. *Id.* at 929. While noting Petitioners' argument that the tile project was a limited public forum, the court did not appear to consider this possibility, apparently because it considered a limited public forum to be a mere subset of a nonpublic forum. *Id.* at n10. The Tenth Circuit did not attempt to reconcile its holding that viewpoint discrimination was permissible under *Hazelwood* with its acknowledgment that this type of discrimination is generally prohibited even in a nonpublic forum. *Id.*

The Tenth Circuit held that "[b]ecause the school permanently integrated the tiles into the school environment, and was significantly involved in the creation, funding, supervision, and screening process of the tile project," the tiles bore the imprimatur of the school. *Id.* at 931. The court further held that the school's restriction on religious symbols was reasonably related to pedagogical interests. *Id.* at 933. The court acknowledged out that Respondent could not have succeeded in defending its actions based on Establishment Clause concerns; however, the court accepted Respondent's

argument that the restriction was necessary because religious references might serve as a "reminder of the shooting." *Id.* The Tenth Circuit disregarded the fact that the entire tile project was a reminder of the shooting for those involved, and the fact that tiles containing thirteen "secular" symbols (stars, flowers, butterflies, tear drops, etc.), or otherwise memorializing the thirteen victims, were placed the hallways, along with other reminders such as tiles with initials of slain students. *See, e.g.*, Lodging at L12 (13 columbines, 13 stars), L13 (clock face at 11:10, when shooting began; initials of student Matthew J. Kechter), L14-L16 (13 tears, stars, butterflies). Likewise, it agreed with school officials that they had a legitimate pedagogical interest in preventing the walls from becoming "a situs for religious debate, which would be disruptive to the learning environment." *Id.* The Tenth Circuit disregarded the uncontroverted testimony of school district officials that there had never been any disruptions because of religion or religious symbols in the school. C.A. App. 118. The Court of Appeals thereby validated Respondent's discrimination against religious expression in its tile project.

## REASONS FOR GRANTING THE WRIT

### I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTING VIEWS AMONG THE CIRCUIT COURTS REGARDING WHETHER *HAZELWOOD* PERMITS PUBLIC SCHOOL OFFICIALS TO IMPOSE VIEWPOINT-BASED RESTRICTIONS ON SPEECH THAT IS DEEMED "SCHOOL-SPONSORED."

#### A. The Tenth Circuit's Decision is in Direct Conflict With Decisions of the Ninth and Eleventh Circuits Regarding Whether the *Hazelwood* Standard Permits Public School Officials to Impose Viewpoint-Based Restrictions on Student Speech.

The Eleventh and Ninth Circuits have directly held that the *Hazelwood* standard does not permit viewpoint-based speech restrictions. The Tenth Circuit's holding is thus in direct conflict with the Eleventh Circuit's decision in *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989) and the Ninth Circuit's holding in *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. den., Downs v. Los Angeles Unified Sch. Dist.*, 532 U.S. 994 (2001).

In *Searcey*, an organization challenged a school board's refusal to allow it to participate in the school's "Career Day" because of the organization's viewpoint regarding military service. *Id.* The Eleventh Circuit specifically considered the board's argument that the *Hazelwood* standard permits educators to make viewpoint-based decisions. *Id.* at 1324. The Eleventh Circuit adamantly rejected that notion, expressing its doubt that the *Hazelwood* Court intended to "drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views." *Id.* at 1319, n.7. The court stated:

> Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis.

*Id.* at 1325 (citations omitted, emphasis in original). In reaching this conclusion, the Eleventh Circuit pointed to traditional First Amendment jurisprudence, in which viewpoint discrimination has been prohibited in non-public forums. *Id.* at 1324.

The Ninth Circuit also has held that restrictions imposed by a school on "school-sponsored speech" must be viewpoint-neutral. *Downs*, 228 F.3d at 1011. The court appeared reluctant to reach this conclusion, noting that the *Hazelwood* decision did not explicitly require viewpoint neutrality. *Id.* at 1010. However, the Ninth Circuit found that it was compelled by its own precedent to

require viewpoint-neutrality in the context of restrictions on school-sponsored speech. *Id.* at 1011. Significantly, in the case that the *Downs* court felt compelled to follow in this respect, *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991)(*en banc*), the full Ninth Circuit appeared to have assumed that *Hazelwood* did not vitiate the long-standing rule that government restrictions on speech may not be based on viewpoint, but it did not discuss this point. In *Planned Parenthood* the Ninth Circuit stated:

> Having concluded that the advertising pages in the school district's school-sponsored publications are nonpublic forums, we now consider whether the school's justification for refusing to publish Planned Parenthood's advertisement is reasonable. Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and *are viewpoint neutral.*

*Planned Parenthood*, 941 F.2d at 829 (emphasis added, internal citations omitted).

Both the Ninth and Eleventh Circuits have thus directly held that the *Hazelwood* standard does not open a new and dramatic loophole in First Amendment jurisprudence by permitting school officials to implement viewpoint-based speech restrictions. The Tenth Circuit has rejected the wisdom of its sister Circuits on this issue. The First Circuit, a subsequent panel of the Third Circuit, and the Seventh Circuit have indicated their probable alignment with the view expressed by the Tenth Circuit in this regard, as explained hereinafter.

Petitioners request that this Court grant their petition for a writ of certiorari to resolve this direct conflict between Circuits. Religious expression that occurs in the school context is subject to viewpoint-based restriction in the six states comprising the Tenth Circuit, while this type of restriction is prohibited in at least two other Circuits. Such an incongruous interpretation of the First

Amendment, which implicates not only the freedom of speech but also, as Petitioners' experience demonstrates, religious expression and exercise, should not go unresolved by this Court.

B. Considerable Divergence Exists Between the Circuits as to the Proper Application of the *Hazelwood* Standard.

The Tenth Circuit itself noted the split among the Circuits as to the proper application of the *Hazelwood* standard with respect to viewpoint-based restrictions on "school-sponsored" speech. 298 F.3d at 926-28. As catalogued by the Tenth Circuit, a recent panel of the Third Circuit and the First Circuit have indicated their respective beliefs that the *Hazelwood* standard would permit high school officials to restrict expression because of its viewpoint, while the Ninth, Sixth and Eleventh Circuits have indicated their respective opinions that *Hazelwood* would not permit viewpoint-based restrictions. *Id.* at 926-27.

In addition to the explicit conflicts noted above with the Ninth and Eleventh Circuits, the Tenth Circuit's decision is in implicit conflict with the Third Circuit's earlier decision in *Brody v. Spang*, 957 F.2d 1108 (1992), and the Sixth Circuit's decision in *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), *rev'd and remanded on other grounds*, 236 F.3d 342 (6th Cir. 2001). The Third Circuit in *Brody*, commenting on *Hazelwood*, stated that "since the [Supreme] Court found that the newspaper was a non-public forum, it further held that any reasonable *non-viewpoint-based* restrictions were acceptable, provided that school officials' regulations were 'reasonably related to legitimate pedogogical concerns.'" *Brody, supra*, at 1118 (emphasis added). The Tenth Circuit noted that "[a] divided panel of the Sixth Circuit in *Kincaid* stated, without discussion, that the *Hazelwood* Court 'noted' that non-viewpoint-based restrictions were part of its analysis." 298 F.3d at 927, citing *Kincaid*, 191 F.3d at 727.

Oddly, the Tenth Circuit explicitly based its holding that the *Hazelwood* standard permits high school officials to implement

viewpoint-based speech restrictions on reasoning from a Third Circuit decision subsequent to *Brody* that had actually been vacated nearly three years prior to the Tenth Circuit's decision. *Id.* The Tenth Circuit relied upon the Third Circuit's opinion in *C. H. ex rel. Z. H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999), which was vacated at 197 F.3d 63 (3d Cir. 1999). A 1992 panel, as noted above, had ruled that viewpoint discrimination was not allowed by *Hazelwood*. Half of the *en banc* Third Circuit in 1999 agreed when it vacated the panel decision in *C.H. v. Oliva, supra.*

Other Circuits appear to align themselves with the Tenth Circuit's view. The First Circuit has stated that *Hazelwood* "did not require that school regulation of school-sponsored speech be viewpoint neutral." *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993). It appears that the Seventh Circuit would follow this view as well. In *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464 (7th Cir. 2001), the Seventh Circuit considered a challenge to a high school official's censorship of a cross from a mural proposed by the Bible Club in response to the school's invitation to all student groups to paint murals in the school's hallways. 274 F.3d at 467. Judge Posner, writing for the court, indicated that the Seventh Circuit would likely uphold school officials' viewpoint-based suppression of speech if the school officials asserted that such suppression was necessary to maintain "order and discipline." *Id.* at 467. The court relied upon *Hazelwood* for the proposition that school officials may exercise greater control over student speech than the state is permitted to exercise over the free speech of adults in "the normal venues." *Id.* Then the court stated that "order and discipline" are part of any school's basic educational mission and thus provide adequate justification for speech restrictions. *Id.* At no point did the court indicate any concern about the fact that the school official had censored controversial viewpoints. Rather, it held that this fact provided the very justification for the school's actions.

> [T]here was no evidence of discrimination against the Bible Club.... [The principal's] reaction to the swastika, and to

> the naming of a brand of beer, in proposed secular murals shows that he was discriminating not against religion but merely against displays, religious or secular, that he reasonably believed likely to lead to litigation or disorder.

*Id.* at 466.

The widespread variance in the Circuits' interpretations of *Hazelwood* means that the important question of whether or not religious students and community members are protected from viewpoint-based discrimination turns on the geographical location in which their speech occurs. Petitioners submit that certiorari is particularly appropriate in this case, as there is a dramatic divergence in the Circuits' approach to evaluating viewpoint-based speech restrictions in the context of the nation's public schools.

## II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' DRAMATIC DEPARTURE FROM THE SUPREME COURT'S FIRST AMENDMENT PUBLIC SCHOOL JURISPRUDENCE.

### A. This Court's Precedents Have Consistently Held that Viewpoint-Based Discrimination is Not Permitted in a Limited Public Forum or a Non-Public Forum.

This Court has repeatedly and consistently held that government actors may not impose viewpoint-based restrictions on speech, whether the expression occurs in a limited public forum or a non-public forum. As Justice Brennan once stated, "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 62 (1983)(Brennan, J., dissenting). This same rule pertains in a public school setting; in fact, the Court has never countenanced viewpoint based exclusion of private religious views from public school settings.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court indicated that even in an educational setting, once a government entity opens any type of forum, it assumes "an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267. *See also Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). In *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), this Court explained that in a non-public forum, government officials may not deny access to a speaker solely to suppress his point of view. *Cornelius*, 473 U.S. at 806.

While *Widmar* applied First Amendment forum analysis in the context of a public university, the Court applied the same analysis in *Lamb's Chapel*, where the challenged policy governed public elementary and secondary schools. *Lamb's Chapel* was factually similar to Petitioners' case in that those who sought access to the school's forum were excluded solely on the basis of their religious viewpoint. The Court reiterated that even in a non-public forum, restriction or limitation of access to the forum may not be based on the particular viewpoint that the speaker wishes to express.

> [The] subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius*....

*Id.* at 392-93, *citing Cornelius*, 473 U.S. at 806. Likewise, in his concurrence in *Lamb's Chapel*, Justice Kennedy indicated that the Court unanimously agreed that school officials' overt, viewpoint-

based discrimination contradicted the First Amendment. *Id.* at 397 ("Given the issues presented as well as the apparent unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Free Speech Clause of the First Amendment...")(Kennedy, J., concurring).

In *Good News Club v. Milford Central School*, *supra*, the Court again announced that viewpoint-based discrimination is not permissible in a limited public forum, even where that limited public forum exists in the context of a public school. "[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." 533 U.S. at 111-12. In *Good News Club* as in *Lamb's Chapel*, the court appears to have been unanimous on this point.

Finally, while the Tenth Circuit purported to rely on *Hazelwood* in reaching its conclusion that public high school officials are permitted to restrict expression based on its viewpoint, *Hazelwood* itself does not support such a holding. In *Hazelwood* the Court upheld the public high school's censorship of articles prepared by students for the school's newspaper. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The articles addressed the sensitive issues of teen pregnancy and divorce. *Id.* at 263. This Court held that school officials may restrict "school-sponsored" speech that occurs in a non-public forum provided that the restriction is reasonably related to legitimate pedagogical concerns. *Id.* at 270-73. However, the case did not involve any question of viewpoint discrimination. The Court ruled only that "educators do not offend the First Amendment by exercising editorial control over the style and *content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (emphasis added).

None of this Court's First Amendment precedents appear to support the Tenth Circuit's holding that public high school officials may impose viewpoint-based speech restrictions. To the contrary, the Court's previous holdings have consistently and adamantly

maintained that viewpoint-based restrictions are repugnant to the First Amendment. Petitioners request that this Court grant their petition for a writ of certiorari to clarify, once and for all, that state actors may not restrict expression based on its religious viewpoint, even in the context of a public school, and to put to rest the notion that *Hazelwood* provides a loophole to this pinnacle of First Amendment analysis.

### B. This Court's Precedents Have Uniformly Held that the First Amendment Forbids Government Actors to Suppress Ideas Simply Because they Might Cause Controversy or Offense.

The Tenth Circuit's decision represents a grave and substantial departure from this Court's unwavering commitment to its interpretation of the First Amendment as precluding censorship of expression based solely on the viewpoint of the expression. If the Tenth Circuit's decision stands, it will vitiate at least two of this Court's holdings to that effect.

First, this Court stated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) in no uncertain terms, that this type of censorship is impermissible under the First Amendment.

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of

> Americans who grow up and live in this relatively permissive, often disputatious, society.

393 U.S. at 509 (internal citations omitted).

The Tenth Circuit's decision flies in the face of *Tinker* because it allows public high school officials to suppress speech simply because they believe that the speech might create controversy or cause emotional discomfort. The uncontroverted facts in Petitioners' case indicate that there had never been a single incident of disturbance caused by religious controversy at Columbine High School. *Tinker* is apparently considered a dead letter in the Tenth Circuit inasmuch as the Tenth Circuit validates restrictions on student speech even where the restrictions are based entirely on school officials' "undifferentiated fear or apprehension of disturbance." Moreover, according to the Tenth Circuit's interpretation of *Hazelwood*, community members as well have lost virtually all First Amendment protection in any expressive activity that can be squeezed into the "school-sponsored" category. Public school officials are permitted total discretion to restrict speech in this context when it expresses ideas that they disfavor. The only limit to this broad discretion vested in school officials is the requirement that they articulate some "legitimate pedagogical concern" that supports the restriction. And according to the Tenth Circuit, a school official's fear that the expression may cause controversy will suffice.

The Court of Appeals' decision also substantially undermines the holding of *Board of Educ. of Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982), in which the Court ruled that "local school boards may not remove books from the school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.'" The contents of public school library shelves certainly bear the imprimatur of the school in the same manner as, or more than, the tiles involved in the tile project. But in the Tenth Circuit, if school officials may banish religious expression from an art project in which public participation was invited simply because they

are unwilling to endure the "controversy" it might produce or any unpleasant feelings it may elicit from students, surely they enjoy at least as much discretion to remove controversial books from the school library. The Tenth Circuit's decision in this case may well give educators license to remove from school library shelves such controversial books as *The Catcher in the Rye*, *1984*, *Brave New World*, *Lord of the Flies*, *The Autobiography of Malcom X*, and the *Holy Bible*. The Tenth Circuit thus misses the point in observing that viewpoint neutrality would require Respondent to post a tile that states "God is Hate" if it posts one stating "God is Love." 298 F.3d at 932, n.14. Rather, in its regime allowing Respondents to employ viewpoint discrimination, Respondents could choose to display a tile that states "God is Hate" (or "God is Love," or "God is a Myth") with no obligation to post tiles that express other viewpoints.

Finally, the Tenth Circuit's opinion vitiates at least three of this Court's precedents that have uniformly held that school officials may not impose restrictions on religious speech that are not imposed on secular speech. *See Board of Educ. of the Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel, supra; Good News Club, supra*. According to the Tenth Circuit's opinion in Petitioners' case, school officials are at liberty to single out religious expression and banish it from any activity that can be said to be "school-sponsored." In fact, the Tenth Circuit's decision likely *ensures* that religious speech *will be* singled out for disfavored treatment, because it explicitly validated the fear of religious controversy as a legitimate pedagogical concern that will justify censorship. 298 F.3d at 933. Thus, the Tenth Circuit has turned traditional First Amendment jurisprudence on its head. Religious and political expression, which heretofore had enjoyed the highest level of First Amendment protection, now are the easiest targets for school-imposed restrictions simply because these types of

expression are deemed inherently controversial by school officials.[12]

### C. The Tenth Circuit Permits *Hazelwood* to Circumvent the Supreme Court's Establishment Clause Jurisprudence.

A startling effect of the Tenth Circuit's interpretation of *Hazelwood* is that it allows school officials to suppress religious expression in a "school-sponsored" activity simply because it is religious while avoiding the traditional requirement that they justify this type of suppression by demonstrating a realistic danger that the school would risk an Establishment Clause violation by permitting the expression. The record in Petitioners' case reveals that Establishment Clause concerns were the real impetus for the school's prohibition of "religious" tiles. App. at H18, I1 - I2 (Monseu); J2 - J6 (DeStefano). The Tenth Circuit recognized the fallacy of the school's reasoning in this regard. 298 F.3d at 933. Nonetheless, the Tenth Circuit found that the speech restrictions passed constitutional muster because they fell within the *Hazelwood* standard, which, as interpreted by the Tenth Circuit, allows virtually any speech restrictions.

The Supreme Court has repeatedly held that government officials cannot exclude private religious expression from a public forum solely because of concern about avoiding an Establishment Clause violation, when the effect of allowing the religious expression would be to maintain neutrality between religious and non-religious expression. *See, e.g., Board of Educ. of the Westside*

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[12] Although the Court of Appeals concluded by assuring that despite its conclusion that *Hazelwood* countenances viewpoint discrimination, "[a] number of constitutional restraints continue to operate on public schools' actions, such as the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and substantive due process," 298 F.3d at 934, it does not even attempt to explain how these constitutional rights could circumscribe its holding that unwanted private expression may be censored by school officials.

*Community Sch. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel, supra; Good News Club, supra*. But if the Tenth Circuit's interpretation of *Hazelwood* stands, *Hazelwood* will become a safe haven for public school officials' suppression of religious expression. As long as school officials can contend that student religious expression occurred within a "school-sponsored" context, they will be free to implement wholesale suppression of religious student speech, justifying their actions by a vague concern that the speech might cause controversy. This holding vitiates that portion of *Mergens* that rejected an Establishment Clause challenge to the Equal Access Act on the basis, *inter alia*, that the Bible Club would be granted access to the school newspaper, yearbook and other activities expressly termed "school-sponsored" under *Hazelwood*. 496 U.S. at 237, 248 (citing *Hazelwood*, 484 U.S. at 271). Thus, school officials in the states comprising the Tenth Circuit have license to restrict religious speech, including associational speech protected by the federal Equal Access Act, because of their fear of violating the Establishment Clause while avoiding the corresponding responsibility to demonstrate that there is some validity to that concern.

## CONCLUSION

For the reasons set forth hereinabove, Petitioners respectfully request that this Honorable Court grant their Petition and issue a writ of certiorari to the Tenth Circuit to review the issues raised herein and to resolve the conflict among the Circuits as to the appropriate application of *Hazelwood* to viewpoint-based speech restrictions.

Respectfully submitted,

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